BRIEF IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI.*

The question involved herein may be reduced to the following proposition:

The penalties prescribed by section 2857, U. S. C. A., cannot be imposed for making false entries except on forms prescribed by the Commissioner of Internal Revenue and approved by the Secretary of the Treasury, and making false entries on commercial invoices, the form for which was not prescribed by the Commissioner and approved by the Secretary, does not constitute a violation of section 2857, U. S. C. A.

We do not contend that the Act of Congress, under which petitioners were prosecuted, delegating to the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, the power to make rules and regulations and to prescribe forms regulating the business of wholesale liquor dealers, is unconstitutional. We believe that in the act in question the Congress has declared a policy with respect to the subject, and may therefore confer upon administrative officers the "power to fill up the details" by prescribing administrative rules and regulations to promote the purpose of the legislation and to carry it into effect. See:

United States v. *Goldsmith,* 91 F. (2d) 893;
United States v. *Tishman,* 99 F. (2d) 951.

We further concede that the courts take judicial notice of rules and regulations of administrative departments, upon which have been conferred that power by an Act of Congress, when such rules and regulations are prescribed in

accordance with the will of Congress as disclosed by the act delegating the power.

—*Dominici* v. *United States,* 72 Fed. 46.

It is our contention that the Congress has delegated the power upon the Commissioner, subject to the approval of the Secretary of the Treasury, to prescribe rules and regulations and to establish the forms upon which the records of a wholesale liquor dealer shall be kept, but that the prosecution proved that the form of record on which the alleged false entries were made was not prescribed by the Commissioner and was not approved by the Secretary. On the contrary it appeared that the form of invoice was not even submitted to the Commissioner or the Secretary for approval, but was a form of record submitted to and approved by the District Supervisor of the Alcohol Tax Unit only. Therefore, our question is whether the power delegated by the Act of Congress to the Commissioner to prescribe rules and forms, with approval of the Secretary, can in turn be delegated by the Commissioner to a District Supervisor of the Alcohol Tax Unit, and the approval by the Secretary dispensed with.

The act under consideration provides:

> "* * * The records shall be kept and the transcript shall be rendered in such form, and under such rules and regulations as the Commissioner, with the approval of the Secretary, may prescribe. * * * Every rectifier and wholesale liquor dealer who refuses and neglects to keep such records in the form prescribed by the Commissioner, with the approval of the Secretary * * * or makes any false entry therein * * * shall pay a penalty of $100 and, on conviction, shall be fined not less than $100 nor more than $5,000 and be imprisoned not less than three months nor more than three years. * * *"

The rules prescribed by the Commissioner, and approved by the Secretary, were established at the trial by the

introduction of Form 338 (R., p. 119), whereon they appear under the heading: "Instructions for Wholesale Liquor Dealers." These rules prescribe that every wholesale liquor dealer shall keep Record 52 and render monthly transcripts on Form 52A and 52B and monthly summary on Form 338; that entries shall be made on Record 52 as indicated by the headings on the various columns and in accordance with those instructions, not later than the close of business on the day on which the transactions occur; that under the heading "Address" on Record 52 there shall be entered the town or city and state, and if a city, the street and number, of the person from whom received or to whom sent; that "*the wholesole liquor dealer need not enter on Record 52, part 2 (Form 52B) serial numbers of cases of distilled spirits removed from his premises, provided that he keeps in his place of business a separate record, approved by the District Supervisor, showing such serial numbers with necessary identifying data, including the date of removal and the name and address of the consignee. Such separate record may be kept in book form (including loose-leaf books) or may consist of commercial papers, such as invoices or bills.* Such books, invoices and bills shall be preserved for a period of 4 years and in such a manner that the required information may be readily ascertained therefrom and during such period, shall be available during business hours for inspection and the taking of abstracts therefrom by government officers." (Italics ours own.) The rules further prescribed that the wholesale liquor dealer shall prepare a full and complete transcript of Record 52 and Forms 52A and 52B and a summary report on Form 338 and forward them to the District Supervisor, Alcohol Tax Unit, on or before the 10th day of the succeeding month.

It will be noted that the petitioners were not charged with having failed to keep Record 52 or Forms 52A or 52B

or Form 338, as required by the rules, or that they made any false entry therein. It is to be further noted that they were not charged with falsifying on the invoices the serial numbers of cases of distilled spirits disposed of by them.

On the very day that Southwestern Distilled Products, Incorporated, commenced business at Sulphur Springs, on April 18th, 1939, there was filed with the Division of the Federal Registry, Treasury Department decision number 4896, which was promulgated April 17th, 1939, which decision, in part, said:

> "Internal Revenue forms prescribed by the Commissioner of Internal Revenue and specifically approved by the Secretary of the Treasury, applicable under any provision of law on the date of the enactment of the Internal Revenue Code, * * * are hereby prescribed and made applicable under the provisions of the Code * * * in so far as any such form is not inconsistent with the Code."

That decision was adopted for the purpose of conforming the Internal Revenue Code adopted by Congress on February 10th, 1939, to the Internal Revenue forms theretofore prescribed in accordance with the rules and regulations previously adopted under the authority of section 2857 shortly after its enactment.

We submit that when the Congress delegates to administrative officers in the Executive Department the power to adopt rules and regulations to effect the objects and purposes disclosed in the Act, and limits the exercise of such delegated power, such as was done in the instant case by requiring the approval thereof of the Secretary of the Treasury, such rules and regulations must be adopted in the manner prescribed by the Congress. In other words, by the very act under consideration the power delegated to the Commissioner is limited to the extent that his action must be ap-

proved by the Secretary of the Treasury. Indeed, the Secretary, by the decision above quoted from, has followed the will of Congress by requiring the specific approval by him of Internal Revenue forms prescribed by the Commissioner. Here we find no approval of the forms of invoices, on which the alleged false entries were made, by the Secretary. In fact it was agreed by the parties that the form itself was not prescribed by the Commissioner or approved by the Secretary, but was prepared by the petitioners themselves and approved by the District Supervisor. If the power delegated by Congress can be thus in turn delegated to another, and the approval by the Secretary thus dispensed with, is there any limit to which officers of the Internal Revenue Department can go? If the power delegated to the Commissioner can be by him delegated to a Supervisor in respect to the prescribing and approval of Internal Revenue forms, without approval by the Secretary, why cannot the power delegated to the Commissioner to prescribe rules and regulations subject to the approval of the Secretary, be delegated to the Supervisor and the approval of the Secretary entirely dispensed with?

In *A. L. A. Schechter Poultry Corporation* v. *United States,* 295 U. S. 495, 79 L. ed. 1570, this court held that Congress may not delegate or transfer to others essential legislative functions, but that the Constitution does not deny to Congress necessary resources of flexibility and practicability, which will enable it to perform its functions in laying down policies and establishing standards, while leaving to *selected* instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by Congress is to apply.

In *Wallace* v. *Currin,* 95 F. (2d) 856, affirmed by this court in 306 U. S. 1, 83 L. ed. 441, the court held that Congress may leave to *selected instrumentalities* the making of

subordinate rules within prescribed limits and the determination of facts to which the policy prescribed by Congress is to apply.

In *Panama Refining Company* v. *Ryan,* 293 U. S. 388, 79 L. ed. 446, this court said:

> "The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicability which will enable it to perform its functions in laying down policies and establishing standards, while leaving to *selected instrumentalities* the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the Legislature is to apply." (Italics our own.)

In *Wayman* v. *Southard,* 10 Wheat. 1, 43, 6 L. ed. 253, 262, this court said:

> "A general provision may be made, the *power given to those who are to act* under such general provisions to fill up the details." (Italics our own.)

In *J. W. Hampton, Jr., & Co.* v. *United States,* 276 U. S. 394, 407, 72 L. ed. 624, 629, the court said in part:

> "Congress may feel itself unable conveniently to determine exactly when its exercise of the legislative power should become effective, because dependent on future conditions, and it may leave the determination of such time to the decision of an executive, or, as often happens, in matters of state legislation, it may be left to a popular vote of the residents of a district to be affected by the legislation."

In *Buttfield* v. *Stranahan,* 192 U. S. 470, 48 L. ed. 525, the court upheld the validity of an Act of the Congress conferring authority upon the Secretary of the Treasury to establish uniform standards of purity, quality and fitness

for consumption of all kinds of teas imported into the United States.

In *St. Louis I. M. and S. R. Co.* v. *Taylor,* 210 U. S. 281, 52 L. ed. 523, the court upheld the act conferring upon the Secretary of War the power to determine whether bridges and other structures constitute unreasonable obstructions to navigation and to specify and prescribe the structural changes that are required.

It will thus be seen that in the above cited cases, as well as in the act under consideration here, the Congress selected the instrumentality upon which it conferred the power to prescribe rules and regulations and to adopt forms. That instrumentality is selected. The power thus conferred upon the Commissioner however is circumscribed to the extent that his action in carrying out the power delegated must be approved by the Secretary.

If the Commissioner, in exercising the delegated power, can delegate the duty on him to another executive officer and dispense with the approval of the Secretary as required by the act, as was done in the case at bar, then it follows that the powers conferred on the Secretary of the Treasury, the Interstate Commerce Commission and the Secretary of War in the cases above cited could be by those selected instrumentalities delegated to other instrumentalities.

An extensive search of the authorities has failed to reveal a decision of any court on the precise question involved here. In none of the adjudicated cases dealing with questions of delegated powers has there been advanced a contention that the exercise of such powers was contrary to the manner prescribed by the act for their exercise. We believe this case to be the first in which this question is involved. We submit that, inasmuch as the Congress has limited the administrative officers in performing the duties delegated to

them to the subjects mentioned in the act itself, likewise should the exercise of those powers be limited to the specific instrumentalities named by the Congress in the act to perform them. In other words, where the Congress has specifically chosen the officer, vested in him the delegated power, and provided that his action shall be subject to the approval of another administrative officer, the power cannot be exercised by a third officer selected by the former and the approval of the latter dispensed with. This is exactly what was done in the case at bar. We find that the Act of Congress placed in the Commissioner of Internal Revenue the duty of adopting rules and regulations and prescribing forms, subject to the approval of the Secretary of the Treasury. We further find that the power to adopt the form which is the subject-matter of this prosecution was in turn delegated by the Commissioner to the District Supervisor of the Alcohol Tax Unit, in whom was vested the exclusive power of approval of the form. We further find that the Secretary, in whom was delegated by Congress the power to approve the form, did not approve the same; in fact, the same was never submitted to him for approval or disapproval.

The indictment charged that the petitioners made false entries "in the records required by law to be kept" by the corporation of which they were officers, agents or employees. Section 2857, *supra,* provides that the wholesale liquor dealer shall keep his records in such form and under such rules and regulations as the Commissioner, with the approval of the Secretary, may prescribe, and that if he refuses to keep such records in the form prescribed by the Commissioner, with the approval of the Secretary, or makes any false entry therein, he shall be subject to the punishment prescribed in the act. We submit that until it is shown that the record alleged to be falsified was a record prescribed by the Commissioner and approved by the Secretary it is not a

record required by law to be kept. If our contention cannot be sustained then it would be possible for the District Supervisor to delegate the power vested in him by the Commissioner to a Deputy District Supervisor, who in turn could delegate the power to some investigator in his office, and so on *ad infinitum*.

Respectfully submitted,

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